

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 5

WAL-MART STORES, INC.

Employer

and

Case 5-RC-15602

UNITED FOOD AND COMMERCIAL  
WORKERS UNION, LOCAL 400

Petitioner

**DECISION AND ORDER**

The issue in this proceeding is whether the petitioned-for unit limited to overnight stock employees is an appropriate unit.

The Petitioner seeks to represent all full-time and regular part-time overnight stockers (hereinafter “ONS”), soft line apparel processors,<sup>1</sup> and unloaders located at the Employer’s facility at 8745 Branch Avenue, Clinton, Maryland.<sup>2</sup> The Petitioner argues that the petitioned-for unit shares a close and substantial community of interest that is separate and distinct from that of other store employees, and would thus be an appropriate bargaining unit.

The Employer maintains that the petitioned-for unit does not constitute a functionally distinct group with special interests sufficient to warrant their separate representation. The

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<sup>1</sup> At hearing, the parties and the witnesses used the term overnight stockers to include soft line apparel processors. Thus, all references herein to overnight stockers (“ONS”) are intended to include soft line apparel processors.

<sup>2</sup> At the hearing, the Petitioner stated it was unwilling to accept the assemblers into the petitioned-for unit. However, in its post-hearing brief the Petitioner indicated that if the Regional Director included the overnight assemblers petitioned for in the unit, it would proceed to an election. The petitioned-for unit consists of approximately 37 ONS and 14 unloaders; there are 3 assemblers. There is no relevant history of collective bargaining for any of the employer’s employees at the location involved herein. For ease of reference the unit described above, including the assemblers, will be referred to as the petitioned-for unit. My decision encompasses both unit iterations: the analysis and conclusions remain the same regardless of the assemblers’ inclusion or exclusion.

Employer further argues that the only appropriate unit is a wall-to-wall, storewide unit consisting of approximately 350 employees. No labor organization is seeking to represent these employees in a single storewide unit, and the Petitioner is unwilling to proceed to an election in any other unit than that petitioned for. Accordingly, this decision is limited to whether the petitioned-for unit is an appropriate unit.

I have carefully considered the evidence and arguments presented by the parties on this issue. As discussed below, I conclude that the petitioned-for unit is inappropriate for purposes of collective bargaining.

The Employer presented four witnesses at the hearing: Chris Metz, Clinton store manager, Jarrett Bailey, Clinton store assistant manager, Debra Goss, Clinton store assistant manager who works the overnight shift and Steven Hayes, a former ONS and current assembler at the Clinton store. The Petitioner presented three witnesses: Stan Fortune, a former Wal-Mart employee and manager who last worked for the Company in 2001, and Kevin Blackman and Lloyd Prout, Jr., overnight stockers at the Clinton store.<sup>3</sup>

### BACKGROUND/OVERVIEW

The Employer, a Delaware corporation, is engaged in the operation of retail stores throughout the United States. Solely involved in this proceeding is the Employer's facility located in Clinton, Maryland. The Employer's Clinton facility is a one-story building spanning approximately 140,000 square feet. The store employs about 400 associates, Wal-Mart's term for employees.<sup>4</sup>

The Clinton store sells a wide array of goods and services in a single store facility, including clothing, limited grocery items, stationery, electronics, toys, garden products, automotive products/tire and lube services, and furniture. In addition, there are several independent franchises located in the facility, including a portrait studio, bank, cellular phone retailer, vision center, and McDonald's restaurant. The facility is open to the public from 7:00 a.m. – 11:00 p.m. daily, but customers who are in the store at 11:00 p.m. may continue to purchase merchandise until midnight. The store is staffed around the clock.

The vast majority of the facility consists of a sales floor. Behind the sales floor is the "associate-only" or non-public area of the store. This area contains associate lockers, break rooms, personnel offices, time clocks, bulletin boards, and a work schedule posting area. The

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<sup>3</sup> In its post-hearing brief, the Employer requests that Fortune's testimony be struck for two reasons: first, he never worked at the Clinton store and no longer works for the Company; and second, the Hearing Officer did not permit Employer's counsel to cross-examine Fortune on the (hearsay) sources of his current knowledge of Wal-Mart's operations. Employer's request is denied. It is well settled that "administrative agencies ordinarily do not invoke a technical rule of exclusion but admit hearsay evidence and give it such weight as its inherent quality justifies." Northern States Beef, 311 NLRB 1056 n.1 (1993)(internal citations omitted).

<sup>4</sup> The term associate applies to everyone who works for the Employer, including members of management.

“associate only” portion of the store also includes an area where the store receives merchandise from trucks. Four receiving doors in that area are used in unloading merchandise that comes in from Wal-Mart’s distribution centers as well as trucks from outside “vendors” such as Coca-Cola, Pepsi, Keebler, and UPS. Unloaded merchandise that is not moved directly onto the sales floor is placed in steel bins adjacent to the receiving area. Also immediately adjacent to the receiving area is the bicycle assembly room.

#### OVERALL OPERATIONS OF THE STORE

Store Manager Chris Metz is responsible for the overall operation of the facility. Reporting to Metz are two co-managers and seven assistant store managers. The co-managers have similar responsibilities to Metz; the assistant store managers have store-wide responsibilities while they are on duty but are assigned, and concentrate on, different departments within the store. The balance of the Employer’s salaried management staff consists of the Tire and Lube Express manager, photo manager, and pharmacy manager. The Employer also has hourly managers and supervisors, including department managers, personnel managers, cash office managers, customer service managers, and team leaders.<sup>5</sup>

The Employer employs hourly, non-supervisory associates in dozens of job classifications.<sup>6</sup> It employs sales floor associates in each of its merchandise departments, such as candy, health and beauty, stationery, toys, home furnishings, and ladies wear. These associates’ primary job duties are to provide customer service and to keep the departments tidy and organized, or “zoned”.<sup>7</sup> It employs cashiers, who ring up and bag customers’ merchandise and zone the areas around the registers. Wal-Mart also employs inventory control specialists (ICS), whose primary duties include unloading trucks of goods at the store and then stocking those goods on the sales floor, as well as direct receiving associates (DSD), who are also mainly responsible for unloading truckloads of goods at the Clinton store. In addition, the Employer employs entry and exit greeters. The entry greeters welcome customers as they enter the store and mark merchandise for return or exchange; exit greeters interact with customers as they leave the facility and they check any merchandise that is not in a bag. The Employer also employs stock associates/cart pushers, who stock merchandise on the sales floor and who clear the parking lot of shopping carts. Courtesy desk associates staff the return desk, where customers return or exchange merchandise. Layaway associates staff the layaway department, and maintenance associates are responsible for daily cleanup, painting, and patchwork. The Petitioner does not seek to represent any of these employees.

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<sup>5</sup> Several Wal-Mart managers testified that the term “member of management” refers to salaried managers. For ease of reference, salaried managers will be referred to as managers and hourly managers will be referred to as supervisors.

<sup>6</sup> Every job classification at the facility may not be listed here. The purpose of this compilation is to provide the reader with a general sense of how the store operates.

<sup>7</sup> The sales floor associates, and all other associates described *infra*, are not limited to the duties described herein. However, the duties enumerated comprise the major job functions for each classification.

As indicated, the Petitioner only seeks to represent two job classifications at the facility; unloaders and overnight stockers, although it is willing to proceed to election in a unit that also includes assemblers. The unloaders receive merchandise into the store from Wal-Mart and other vendors' trucks. They unload the trucks, sort the merchandise by department, place it on pallets, and then either place it in bins near the receiving area or pull it to the sales floor to be stocked. The overnight stockers sometimes assist the unloaders in pulling freight to the sales floor; they then stock merchandise in various departments. The assemblers put together certain merchandise for the Employer, including bicycles, lawn and garden supplies such as lawnmowers, and furniture.

All hourly, non-supervisory employees at the facility are hired via the same process. They fill out a common job application, interview with the same hiring team and take drug tests as a condition of their employment. They attend a standardized orientation class, and all employees hired around the same point in time attend an orientation together, regardless of their job classification or shift. All employees are eligible for the same benefits, including health insurance, stock options, profit sharing, 401(k), and employee discounts. They are subject to the same Wal-Mart personnel policies and practices, many of which apply nation-wide. They all enter the facility through the same entrance, punch the same time clocks, use the same break room and lockers, and are entitled to the same number and length meal and rest breaks depending on number of consecutive hours worked per day. All hourly non-supervisory employees start at \$6.25 per hour, although that rate may be adjusted upwards if the new associate has prior relevant experience. Under some circumstances, the store pays a wage differential to associates. Any associate who works overnight (for example between the hours of 10:00 p.m. – 7:00 a.m.) receives a \$1.00 per hour differential. Any associate who works on Sunday also receives a \$1.00 per hour pay differential. In addition, unloaders receive a \$ 0.75 per hour differential and cashiers receive a \$ 0.25 per hour differential. No special skills, experience, or qualifications are required to be eligible for any hourly position at the store, although employees in certain job classifications such as inventory control specialists (ICS), unloaders, and sales associates in the candy department must be able to lift 50 pounds.

The Employer has certain concepts and a corporate culture it attempts to instill in all of its employees. For instance, it has a "ten foot rule" which applies to all employees. This rule directs employees to greet any customer who comes within ten feet of him/her and to offer assistance if needed, regardless of department, shift or job classification. The Employer also maintains an "open door" employee complaint policy for all employees. If an associate has a problem or complaint, he or she may approach any supervisor or manager in the store to discuss or attempt to address the situation. If it is not resolved, the associate may continue all the way up the Employer's hierarchy in an attempt to solve the problem. Discipline is handled in the same store-wide or Company-wide fashion. Any manager may discipline any employee in the store, regardless of which department either the manager or the employee is based.

While the manager and co-managers are responsible for the entire store, the seven assistant managers have particular responsibilities for various departments. Two of the assistant managers are overnight assistant managers who are in charge of the entire store's operations

during the overnight hours, and supervise all employees who work overnight.<sup>8</sup> Employees on this shift request time off from the overnight assistant managers, and contact these managers when reporting late or sick. Additionally, the overnight managers complete and sign the performance evaluations for overnight employees. The assistant managers rotate in and out of the overnight shift, generally working overnight no more than six months at a stretch. Currently, the assistant managers working overnight are Debra Goss and Dwayne Peel.

The assistant managers who do not work the overnight shifts oversee different departments and job classifications. For example, assistant manager Jarrett Bailey generally works either from 7:00 a.m. – 5:00 p.m. or 6:00 p.m., or from 10:00 a.m. – 11:00 p.m. or midnight. In addition to his storewide responsibilities, he specifically oversees associates in the food, stationary, and apparel departments, as well as unloaders and inventory control specialists (ICS). These employees call in sick to and request leave from their hourly supervisor or Bailey, who also complete and sign their performance evaluations.<sup>9</sup>

During daily shift changes between managers, the outgoing and incoming managers will walk the facility floor together. They will discuss merchandising, personnel issues, and tasks to be completed.

#### STORE OPERATIONS: RECEIVING/UNLOADING

As noted above, although the Clinton store is not open around the clock, it is staffed 24 hours per day. The store receives merchandise by truck at all hours. The busiest time for receiving begins at about 4:00 p.m. At this time, Wal-Mart trucks start arriving at the facility's receiving doors from Company distribution centers. Employees from Clinton, as described below, unload the trucks and separate the merchandise by department. The freight is then placed on pallets and either pulled to the sales floor or, if it is overstock, placed in steel bins near the receiving area. The receiving/unloading process for Wal-Mart trucks lasts well into the evening, but rarely past midnight or 1:00 a.m.

At other times of day, the facility receives merchandise from outside vendors such as Coca-Cola, Pepsi, Keebler, Federal Express, UPS, and McLanes. Generally, the vendors' trucks begin arriving at the store at 7:00 a.m., with the exception of McLanes' trucks, which deliver food, health and beauty aids, and pharmaceuticals at 5:00 a.m. on Tuesdays and Fridays. The store receives a significant amount of merchandise, including home entertainment products, pet supplies, sporting goods, home furnishings, crafts, curtains, and clothing, as well as food, health and beauty aids, and pharmaceuticals, via outside vendors' trucks.

Although many associates have intermittent involvement in the Employer's receiving function, employees in a handful of job classifications perform receiving work as a major job duty. The Employer employs three Direct Receiving Associates ("DSD") from 7:00 a.m. – 4:00 p.m. These associates' primary job function is to receive merchandise which comes in from

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<sup>8</sup> At the hearing, "working overnight" was defined as employees who work the majority of their shift between the hours of 12:00 a.m. and 6:00 a.m.

<sup>9</sup> The Employer currently employs no hourly supervisors on the overnight shift.

vendors, unload it, and arrange it on pallets by department. Additionally, the Employer employs approximately 14 inventory control specialists ("ICS"), whose hours are generally 11:00 a.m. – 8:00 p.m. One of the major job functions of the ICS employees is to unload Wal-Mart trucks, and palletize the unloaded merchandise, between 4:00 p.m. and 8:00 p.m. The Employer also employs approximately 14 unloaders, whose hours are 4:00 p.m. – 1:00 a.m. The unloaders' primary job function is to receive, unload, and palletize freight from Wal-Mart trucks as described above. ICS employees and unloaders work alongside each other from 4:00 p.m. and 8:00 p.m. daily, unloading the same trucks and arranging merchandise on the same pallets. Finally, the Employer employs approximately 37 overnight stockers (ONS), who generally work from 10:00 p.m. until 7:00 a.m. While these associates generally do not unload trucks, the record established that they spend a significant amount of time pulling pallets of freight from the receiving area to the sales floor. In performing this function, the ONS associates work alongside the unloaders.

#### STORE OPERATIONS: STOCKING

Once goods are received at the facility, they are either placed in bins off the sales floor, or, much more frequently, taken to the sales floor itself to be stocked. Once on the sales floor, some merchandise is placed on various shelves, racks, and displays for immediate purchase. Other merchandise is placed on "risers", which are the top levels of shelving units and are generally out of the customers' reach. These goods can be quickly accessed as needed and placed on the lower shelves for immediate sale. As mentioned earlier, overstock which is not placed on the risers is kept in bins off the sales floor, near the receiving area.

Like the unloading/receiving process, many associates have intermittent or sporadic involvement with stocking. For example, a cashier may replenish the gum and candy which is for sale near her register, and sales associates in the jewelry department remove jewelry from its shipping material and place it in display cases. In addition, a small percentage of sales associates, who normally work from 7:00 a.m. – 11:00 p.m. or 12:00 a.m., regularly report to work prior to 7:00 a.m. to stock merchandise. However, associates in a handful of job classifications perform stocking as a major, daily job function. The Employer employs about nine stock associates/cart pushers, who work from 7:00 a.m. – 11:00 p.m. These associates have two primary job functions: to gather carts from the parking lot and bring them into a designated area in the building and to stock merchandise. Second, as stated above, the Employer employs about 14 ICS employees from 11:00 a.m. – 8:00 p.m.; one of the ICS employees' major job duties is to receive and unload merchandise, which they typically do from about 4:00 p.m. to 8:00 p.m. However, another major job duty of the ICS is stocking merchandise on sales floor shelves, which is their primary responsibility from 11:00 a.m. until 4:00 p.m. Third, the Employer employs one sales associate – Laverne Dodson – who works from 10:00 p.m. until 7:00 a.m. stocking shoes. Fourth, the unloaders spend a significant percentage of their time stocking. According to assistant overnight manager Debra Goss, while the unloaders spend 60% - 70% of their time performing receiving functions as described above, they spend the remaining 30% of their time stocking. Finally, as noted above the Employer employs about 37 ONS associates, who are generally scheduled to work from 10:00 p.m. - 7:00 a.m. It is undisputed that

these employees spend over 95% of their time pulling freight to the sales floor and stocking it on the shelves.

#### STORE OPERATIONS: ASSEMBLING

The Employer employs three assemblers, two of whom work from 10:00 p.m. – 7:00 a.m. and one of whom works from 6:00 p.m. – 11:00 p.m. These employees' primary job duty is to put together bicycles as well as other items such as furniture or lawn mowers. They also label the bikes with price tags. Approximately once or twice a week, the assemblers and ONS associates work together to stock assembled bikes on the sales floor, on racks hanging from the ceiling. The assemblers also sporadically stock other merchandise and assist in the receiving area by pulling freight to the sales floor. Like the ONS employees, the two assemblers who work overnight are supervised by the assistant overnight managers. These overnight assemblers attend nightly meetings along with ONS, and they take their breaks at the same times.

Assemblers are the only job classification responsible for assembling bicycles. They receive assistance in this job duty from ONS only sporadically, around Christmas and springtime.

#### Analysis: Community of Interest Issue

Section 9(b) of the Act states the Board “shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof....” The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be “appropriate.” Overnite Transportation Co., 322 NLRB 723 (1996); Parsons Investment Co., 152 NLRB 192 fn. 1; Morand Bros. Beverage Co., 91 NLRB 409 (1950), enf'd, 190 F.2d 576 (7<sup>th</sup> Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless “an appropriate unit compatible with that requested does not exist.” P. Ballantine & Sons, 141 NLRB 1103 (1963); Bamberger's Paramus, 151 NLRB 748, 751 (1965); Purity Food Stores, Inc., 160 NLRB 651 (1966). It is well settled that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. General Instrument Corp. v. NLRB, 319 F.2d 420, 422-3 (4<sup>th</sup> Cir. 1962), cert. denied 375 U.S. 966 (1964); Mountain Telephone Co. v. NLRB, 310 F. 2d 478, 480 (10<sup>th</sup> Cir. 1962).

Community of duties and interests of the employees involved is the major determinant. Swift Co., 129 NLRB 1391 (1960). If there is a sufficient community of interest among employees, the fact that groups of employees have different duties and responsibilities does not make a combination of those employees inappropriate. Berea Publishing Co., 140 NLRB 516, 518 (1963). Relevant considerations include: (a) similarity in the scale and manner of determining earnings; (b) common supervision (c) similarity of employee functions/type of work performed; (d) qualifications, skills and training of employees; (e) interchange and contact among employees; (f) integration of production processes; and (g) employment benefits, hours of

work and other terms and conditions of employment. Kalamazoo Paper Box Corp., 136 NLRB 134 (1962).

In the retail industry, the Board has found smaller than storewide units appropriate for the purposes of collective bargaining. *See, e.g., Home Depot USA, Inc.*, 331 NLRB 1289 (2000)(truck drivers and dispatchers); Sears, Roebuck and Co., 261 NLRB 245 (1982)(automotive center employees); W&J Sloane, Inc., 173 NLRB 1387 (1968)(display department employees); Stern's Paramus, 150 NLRB 799 (1965)(separate selling and non-selling units); A. Harris & Co., 116 NLRB 1628 (1956)(warehouse employees). The relevant inquiry in this context is whether employees in the petitioned-for unit have a close and substantial community of interest, separate and distinct from that they share with other store employees. 261 NLRB 245.

Applying the factors above to the facts developed on the record in this case, I find that the employees in the petitioned-for unit are not a sufficiently distinct and homogenous group that could constitute a separate appropriate bargaining unit.

A. Wages

As discussed above, all hourly employees begin at the same wage rate unless they have prior relevant experience, and all are eligible for merit increases. While ONS associates and assemblers receive a night differential, so do any other associates who work overnight. For example, Laverne Dodson, a sales associate who regularly works overnight, receives the same differential. Other sales associates and supervisors work overnight from time-to-time putting together new displays and rearranging shelving; on those occasions they too receive the night differential. While unloaders, who are not classified as overnight employees, receive a pay differential, they are not the only "day shift" job classification to receive an hourly upward pay adjustment; cashiers also receive a differential. Finally, any employee working on Sunday collects a \$1.00 per hour premium, regardless of what time of day the employee works.

B. Common Supervision

The employees in the proposed unit are not commonly managed at an immediate-supervisor level. The record reflects that to some degree all hourly associates are overseen by any manager at the store – all managers have widespread ability to discipline or to act as a resource under Wal-Mart's open door policy. However, the record also reflects that when it comes to requesting vacation, calling in sick, and receiving their performance evaluations, hourly associates are supervised by specific individuals. The record is not clear as to who supervises assemblers, but unloaders are supervised by Jarrett Bailey, while Debra Goss and Dwayne Peel supervise the ONS. Additionally, Bailey supervises employees in other job classifications whom the Petitioner would exclude, including inventory control specialists.

C. Similarity of Employee Function/Type of Work Performed

It is undisputed that the unloaders and ONS associates perform similar job functions; their two primary duties, comprising nearly all of their time, are receiving and/or stocking. However, they are not the only employees who spend significant time performing these job



functions. As discussed above, certain other employee categories, including ICS associates, DSD associates, and stock associates/cart pushers engage in receiving and/or stocking as major components of their job duties. Additionally, it is important to note that assemblers' job functions do not overlap with ONS associates or with unloaders nearly as much as do the above-mentioned classifications'.

D. Qualifications, Skills and Training

The record clearly establishes that while all associates must have basic abilities in reading, writing, and math, no hourly associate is required to have special skills, training, certifications, licenses, or experience to obtain a position at the store. While employees in certain job classifications must be able to lift 50 pounds, this requirement is not uniform across the petitioned-for unit and additionally encompasses excluded classifications.<sup>10</sup>

E. Interchange and Contact Among Employees

The Petitioner contends that employees in the petitioned-for unit have almost no contact or interchange with other employees of the Employer. It presented uncontradicted evidence that ONS associates rarely interact with hourly associates other than the assemblers and unloaders, that there is virtually no temporary interchange<sup>11</sup> between classifications, and that when day shift associates do work overnight, they are engaged in entirely different tasks than are the regular overnight employees. However, these facts fail to take into account the unloaders, who, as described above, work side-by-side with ICS associates for four hours a day, unloading the same trucks and placing the same merchandise on the same pallets. This substantial, daily contact and interaction between members of the proposed unit and excluded classifications significantly weakens the Petitioner's arguments regarding this factor.

F. Integration of Production Processes

Receiving/unloading and stocking are around-the-clock operations at Wal-Mart, and due to the magnitude and importance of these tasks, the Employer employs certain classifications of associates around-the-clock to spend substantial time performing them.<sup>12</sup> As described above,

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<sup>10</sup> With respect to on-the-job training, the record evidence was somewhat contradictory and incomplete. However, no evidence was adduced to suggest any non-supervisory hourly associate receives any intensive or specialized training, and the record as it stands contains sufficient evidence to form a basis for my decision about the appropriateness of the petitioned-for unit.

<sup>11</sup> Permanent transfers do occur between employees in the petitioned-for unit and other employees. The Employer's witnesses testified that 13 permanent transfers in and out of the petitioned-for unit took place over the past six months. Of those, two were promotions, and approximately three occurred after the Union filed the petition for representation in this case.

<sup>12</sup> As noted above, while only a handful of job classifications stock and/or receive as a primary job duty, nearly every associate in the store, from sales associates to cashiers, spends at least some time stocking and/or receiving on an as-needed basis. The amount of time these associates spend in various aspects of stocking/receiving depends on a variety of factors, including department, shift, season, and staffing levels.

DSD associates, ICS associates, stock associates/cart pushers, unloaders, and ONS associates each spend hours per day stocking and/or receiving and unloading. At times they work alongside each other, and at times they work successive shifts, all with the goal of providing a seamlessly integrated retail operation.

G. Employment Benefits, Hours of Work and Other Terms and Conditions of Employment

As discussed earlier, all hourly associates at Wal-Mart are subject to the same benefits, including health, life, vacation, retirement, profit-sharing, etc. The Petitioner contends that employees in the petitioned-for unit shares hours of work and conditions of employment unique within the store. These assertions are belied by the record evidence. First, all employees in the petitioned-for unit do not work the same hours; the unloaders work 4:00 p.m. – 1:00 a.m. while the ONS and assemblers generally work 10:00 p.m. – 7:00 a.m. In addition, a sales floor associate, who is not included in the unit, works 10:00 p.m. – 7:00 a.m. The Petitioner next contends that employees in the petitioned-for unit is subject to different dress code policies than all other associates -- namely that ONS associates may wear sweatpants and hats but are not required to wear the blue Wal-Mart smock and name badge after the store is closed to customers. No evidence, however, was adduced to contradict the testimony addressed by the Employer that the unloaders wear smocks, name badges, and blue jeans, as do several other excluded job classifications. Finally, the Petitioner asserts that alone among associates, unit employees may play radios with any choice of music while working, and may take breaks in any area of the store they wish. Assuming these facts to be true, they are insufficient, in the absence of favorable evidence regarding other factors in the community of interest analysis, to establish that these employees comprise an appropriate unit for purposes of collective bargaining.

Additionally, it is worth noting that the overnight stockers, unloaders, and assemblers do not use equipment that is unique. Instead, the equipment and machines they use are the same as those used by other associates who engage in similar job duties. While they do use ladders when receiving and stocking merchandise, ladders are also used by sales associates and ICS associates in performing various stocking functions. Likewise, pallet jacks,<sup>13</sup> blue carts,<sup>14</sup> and box cutters are used by sales associates and ICS associates as well as by unloaders and overnight stockers. The same is true for lift machinery. Unloaders, ICS associates, overnight stockers, assemblers, and lawn and garden associates all operate forklifts and scissors lifts. In addition, ICS associates, along with overnight stockers and unloaders, use walker stackers.<sup>15</sup>

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<sup>13</sup> A pallet jack is an instrument used to pull and move merchandise on a pallet. It is also some used to move large merchandise such as a television.

<sup>14</sup> A blue cart is a metal device with wheels that is used to move merchandise.

<sup>15</sup> A walker stacker is a piece of equipment that raises up and down, allowing the user to move pallets to upper shelving areas.

Additional Analysis: An Appropriate Unit

Based on the foregoing analysis, I find that employees in the proposed unit, either including or excluding the assemblers, do not share a separate and distinct community of interest based on the factors articulated in Kalamazoo Paper Box Corp., 136 NLRB 134, and applied to a retail store context in, *e.g.*, Sears Roebuck & Co., 261 NLRB 245.

The Petitioner accurately states that a smaller-than-storewide unit may be appropriate in the retail industry. However, it has failed to make the case that this particular smaller-than-storewide unit is an appropriate one under existing Board law. First, the Petitioner's reliance on several Regional Directors' decisions finding units of Tire and Lube Express ("TLE") department employees appropriate at other Wal-Mart facilities is misplaced. TLE departments at those Wal-Mart stores have their own budgets, profit and loss statements, and management hierarchy, separated, in certain respects, from the rest of the store. Additionally, TLE managers hire TLE employees, and the department has separate departmental meetings and a separate work area from the rest of the facility. Finally, many TLE employees perform different functions, use different tools, and wore different uniforms from other associates at the store. *See, e.g.*, Wal-Mart Stores, Inc., 33-RC-4636 (Jan. 25, 2002); Wal-Mart Stores, Inc., 21-RC-20301 (March 26, 2001); Wal-Mart Stores, Inc., 28-RC-5889 (Sept. 29, 2000); Wal-Mart Stores, Inc., 6-RC-11844 (Aug. 3, 2000). None of those factors are present in the instant case.

Additionally, the Petitioner suggests that employees in the petitioned-for classifications share a community of interest separate and distinct from the rest of the Employer's employees because none of petitioned-for employees have significant interaction with customers, and because they work either off the sales floor, or, when on it, largely when the store is closed. The Board has acknowledged a distinct community of interest among "non-selling" job classifications in the retail industry, as well as among warehouse employees. *See, e.g.*, Stern's Paramus, 150 NLRB 799 (1965); A. Harris & Co., 116 NLRB 1628 (1956). However, the record evidence in this case does not support a finding that the petitioned-for unit is appropriate under either of these lines of precedent.

In order to find a unit of non-selling or warehouse employees appropriate, the Board has historically required, *inter alia*, that: (1) the petitioned-for employees not be integrated, to any substantial degree, with other employees in the performance of their ordinary duties; and (2) the petitioned-for unit not arbitrarily exclude job classifications performing warehouse or non-selling functions. *See, e.g.*, Levitz Furniture Co. of Santa Clara, Inc., 192 NLRB 61 (1971); Sears Roebuck & Co., 182 NLRB 777 (1970). In addition, in cases in which warehouse units were sought in retail store operating the Board has required the warehouse to be geographically separate, or at least physically separate, from the retail store. A. Harris, 116 NLRB at 1632. The petitioned-for unit fails all these requirements. The record is clear that the petitioned-for unit, particularly the unloaders and ONS, are functionally integrated with the ICS and DSD associates at a minimum; these employees spend significant time each day performing the same stocking and receiving functions as the employees in the petitioned-for unit. Exclusion of these employees, especially in view of the material differences in hours, supervision, and job functions

within the petitioned-for unit, compels the conclusion that the proposed unit is inappropriate for bargaining.<sup>16</sup>

Based on the foregoing, I find that the petitioned-for unit, with or without the assemblers, is an inappropriate unit. Accordingly, the petition is dismissed.

### **CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is an employer as defined in Section 2(2) of the Act and is engaged in commerce within the meaning of Sections 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. Petitioner, United Food and Commercial Workers Union Local 400, a labor organization as defined in Section 2(5) of the Act, claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The parties stipulated that Wal-Mart Stores, Inc., is a Delaware Corporation with an office and place of business in Clinton, Maryland. It is engaged in the business of owning and operating a retail store. During the preceding 12 months, a representative period, the Employer derived gross revenues in excess of \$500,000 and has purchased and received at its Clinton, Maryland location materials and goods valued in excess of \$5,000 directly from points outside the State of Maryland.
6. The petitioned-for unit does not constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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<sup>16</sup> In reaching this conclusion, I do not suggest that the inclusion of ICS and DSD employees would necessarily render the unit appropriate. As noted above, the sole question here is whether the petitioned-for unit is an appropriate one since, the Petitioner is not willing to proceed to an election in any unit larger than a unit including the overnight stockers, unloaders, and assemblers.

**RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **SEPTEMBER 25, 2003**. The request may not be filed by facsimile.

(SEAL)

Dated: **SEPTEMBER 11, 2003**

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Wayne R. Gold, Regional Director  
National Labor Relations Board  
Region 5

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